

8 Official Opinions of the Compliance Board 161 (2013)

- ◆ **Exceptions Permitting Closed Sessions –**
 - ◇ *Legal Advice, §10-508(a)(7) – Within exception*
Discussion with a lawyer with whom the public body has formed an attorney-client relationship

*Topic headings correspond to those in the Opinions Index (2010 edition) at
<http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

March 29, 2013

Re: Carroll County Commissioners
(S. Wayne Carter, Jr., Carroll County Times, Complainant)

We have considered the complaint of S. Wayne Carter Jr. (“Complainant”) of the Carroll County Times that the Board of Commissioners of Carroll County (“Commissioners”) violated the Open Meetings Act (“Act”) by excluding the public from part of its meeting on January 24, 2013, with the County Attorney and Fred K. Grant, a lawyer from Idaho who is not associated with the Office of the County Attorney. In its vote to close the meeting, the Commissioners relied on the provision of the Act that permits a public body to meet behind closed doors to “receive legal advice from counsel.” The Commissioners, through the County Attorney, responded to the complaint with the pertinent meeting documents, including the minutes of the closed session, a reference to the County’s videotaped minutes of the open session, and some additional facts.

If we were to rely solely on the videotaped minutes of the January 24 meeting, we would share Complainant’s skepticism that Mr. Grant stood in the shoes of “counsel” to the County, as the minutes leave Mr. Grant’s relationship to the County quite mysterious. The County Attorney, however, adds that the County had already retained Mr. Grant to address legal issues and that Mr. Grant provided advice on those issues in the closed session. On the basis of those representations, we conclude that Mr. Grant, though perhaps out of the norm of the “counsel” an observer might expect to see advising a local public body in Maryland, qualified as “counsel” whose legal advice the Act permitted the Commissioners to receive in closed session.

In our view, a simple explanation to the public of the facts the County Attorney provided to us—that the County had already hired Mr. Grant to address legal issues and that he was licensed to practice in Maryland—would have avoided the complaint. Clearly, a public body may

not meet in closed session to receive legal advice from an outside lawyer who appears in furtherance of the lawyer's own purposes or on behalf of a client other than the public body.

Facts

The Commissioners' notice of their meetings for the week of January 21, 2013, stated that the Commissioners would meet in open session at 10:00 a.m. on January 24, 2013, after a session listed as "Closed ~ Administrative Session." The agenda for the Open Session listed three items: "Public Comment," "Coordination Discussion/Board of County Commissioners," and "Closed ~ Legal Advice." The Commissioners kept both written and videotaped minutes.

The "Coordination Session" began with Chief of Staff Powell's introduction of the two people seated at the speakers' table. Messrs. Grant and Verhulst, Mr. Powell said, were "here to discuss a process called coordination," "a conflict resolution process. . . ." Mr. Powell then asked the guests to introduce themselves. From the minutes, it was not clear whether the visitors were speaking on their own account or by invitation. Mr. Verhulst introduced himself as a Wisconsin businessman who, years ago, had challenged the re-zoning of his waterfront property in Wisconsin and then had begun to sit on various land use boards in Wisconsin. Mr. Grant discussed his early career as a prosecutor and criminal defense attorney in Baltimore, explained that he had since moved to Idaho, recounted his efforts on behalf of ranchers who wished to continue to use federal land for grazing cattle, and did not mention any ongoing connection with the practice of law in Maryland. From the introductions, it was not apparent that the Commissioners had retained Mr. Grant as legal counsel to the County. Furthermore, although Mr. Grant spoke at length, that fact never emerged. At times it appeared that he was offering his services to the County for "training" as well as negotiating with, or litigating against, agencies in land use matters. Among other things, he told the Commissioners about his review of a Maryland statute that morning, stated how he would proceed under the circumstances, and addressed commissioners' questions about whether Maryland statutes and the County's policies supported the use of "coordination." Mr. Verhulst spoke little, and his role also was unclear.

Shortly after a commissioner stated that he had "uncovered evidence" that a State agency was going to collect mileage statistics from people in the County, a comment was made that discussions about evidence or facts should occur in closed session, and the Commissioners voted to close the meeting. The Commissioners' written statement of the reasons for closing the meeting states that the Commissioners would "consult with outside counsel regarding law of coordination in Maryland." The written statement records the topics discussed at the closed session as follows: "Legal options re: coordination law in Maryland re: environment and planning compliance." It also bears this note: "No action taken by the Board"

The County Attorney informs us that, before the meeting, he and the Commissioners had given Mr. Grant a list of questions about “the applicability of the coordination doctrine to several Maryland statutes,” that Mr. Grant “answered those questions and offered his advice as to the Commissioners’ legal options in Maryland,” and that Mr. Grant “had been engaged by them” for the purpose of giving “legal advice.” We look to the sealed minutes of the closed session, as we are entitled to do under SG § 10-502.5(c)(ii), to see whether legal advice was actually given. They confirm the expectation stated on the written statement.

The County Attorney further informs us that Mr. Grant is licensed to practice law in Maryland. Indeed, Mr. Grant has registered an Idaho postal address with the Client Protection Fund of the Bar of Maryland, is licensed here, and apparently practiced criminal law here in the 1970s.

Discussion

Under the Act, a public body may convene in closed session to “consult with counsel to receive legal advice,” State Government Article (“SG”) § 10-508(a)(7), so long as the public body has followed the procedures set forth in SG § 10-508(d) for closing a meeting.¹ Complainant questions whether the “legal advice” exception to the Act’s open-meeting requirement extends to a meeting with an attorney who, in Complainant’s words, is not “acting in an official capacity.”

To determine whether a public body has properly invoked the “legal advice” exception, we focus on the nature of the discussion held in the closed session. In the course of doing that, we look first to whether legal counsel was actually present, *see, e.g.* 1 *OMCB Opinions* 1, 3 (1992), and then to whether that counsel in fact gave advice that was legal in nature. *See* 1 *OMCB Opinions* 53, 55 (1993). In doing so, we adhere to the statutory requirement that the exceptions “shall be strictly construed in favor of open meetings of public bodies.” SG § 10-508(c).

As to the presence of legal counsel, we have stated that the exception does not apply to “discussion between the public body and anyone other than its lawyer.” 1 *OMCB Opinions* 53, 54 (1993). By that, we mean “a lawyer designated by the public body to impart legal advice,” which we have construed to be the “lawyer’s interpretation and application of legal principles to specific facts in order to guide future conduct.” 5 *OMCB Opinions* 33, 40 (2006), quoting 4 *OMCB Opinions* 58, 59 (2004). In 5 *OMCB Opinions* 33, we found that a lawyer who was employed by a

¹ Complainant does not question the Commissioners’ compliance with the procedural requirements. Nor do we; the documents submitted by the County Attorney demonstrate that the Commissioners held the requisite public vote to close and that their presiding officer made the requisite written statement of the statutory basis and reason for closing and the topic to be discussed.

county school system as its director of legal services qualified as “counsel” for purposes of the exception, and we did not restrict the Board’s use of the exception to discussions with the Board Counsel. *Id.* at 39-40.

We have never applied the exception in the absence of a lawyer-client relationship between the person giving the legal advice and the public body. For example, the exception would not permit a public body to close a session to receive “advice” from an outside lawyer who was acting as an advocate for a private entity or otherwise had not formed an attorney-client relationship with the public body.² Here, however, the County Attorney states that the County had procured the services of Mr. Grant before the Commissioners closed the January 24 meeting, and that those services were legal in nature. On the basis of that information, we conclude that Mr. Grant stood in the position of a “legal counsel” whose legal advice a public body may receive behind closed doors. And, so long as the Commissioners used the closed-door session only to receive Mr. Grant’s legal advice on the “coordination process,” described by Mr. Grant as a statute-based tool used by local governments to ensure that federal and state agencies “coordinate” their decision-making with local policies, then the discussion fell within the “legal advice” exception to the Act’s openness mandate.³ In those events, the Commissioners did not violate the Act. If we have drawn the wrong conclusion, and the Commissioners were instead meeting with Mr. Grant to discuss whether to engage him, then the personnel or procurement exceptions perhaps would have applied, but not the “legal counsel” exception.

² In 5 *OMCB Opinions* 33, we stated that we had “never circumscribed § 10-508(a)(7) by reference to the technicalities of whether an attorney-client privilege exists.” *Id.* at 40. By that, we did not mean that a public body may close a meeting to discuss matters with a lawyer with whom the public body has no lawyer-client relationship. Instead, we meant what we said: we do not define the “legal advice” exception by reference to the elements needed to establish that a communication is subject to the attorney-client privilege. We therefore did not reach that public body’s argument that the closed-session communications did, in fact, meet those elements.

³ A public body’s use of the “coordination doctrine,” as described by Mr. Grant, seems also to involve “training,” which we do not associate with legal matters, and the discussion of which would very likely not fall within the exception. As explained by one offeror of “on-location and online coordination training events”: “Coordination is a powerful process that takes time and effort. In order to conduct a successful coordination process, the local government’s elected and appointed officials, along with staff, who will be involved in the coordination process need to be trained in the process and how it can be applied to the issue(s) in question. Especially for a local government’s first experience in conducting a coordination process, we strongly advise local governments to seek guidance from professionals with coordination expertise to significantly increase your chances for success.”

Conclusion

In conclusion, Mr. Grant, as a lawyer whose services the County had procured before it conducted the closed session, qualified as “counsel” for purposes of the exception claimed by the Commissioners as the basis for excluding the public from their discussion. When, as here, the events of the open meeting might create some doubt about the role of an out-of-state lawyer vis-à-vis a public body that already has in-house counsel, we suggest that the public body might avoid suspicion by simply telling the public what the lawyer is doing there.

Open Meetings Compliance Board

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